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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

BRANDY STEWART, Individually and as Successor Trustee, etc., Plaintiff and Appellant, v. WARD SILK HAYNES et al., Defendants and Respondents.	A098994 (Alameda County Super. Ct. No. 800639-4)

Appellant obtained a default judgment against respondents, and did not file a timely appeal from the order setting that judgment aside. Respondents then prevailed at trial. On this ensuing appeal, we conclude that we lack jurisdiction to consider appellant's challenge to the order setting aside the default judgment. We also find no abuse of discretion in the trial court's refusal to allow appellant to amend her complaint after resting her case at trial. We therefore affirm.

BACKGROUND AND PROCEDURAL HISTORY

Because we will resolve this appeal on procedural grounds, we discuss the underlying facts only briefly. Appellant Brandy Stewart's mother, Charlean Johnson, died some time prior to the events leading to this litigation. As of January 1998, Stewart was acting as the administrator of Johnson's estate, the assets of which included a house in Alameda County (the Johnson house). Stewart herself occupied another house (the house) just down the street from the Johnson house. Stewart contends that as of January 1998, record title to the house Stewart occupied was held by a living trust created

by Johnson, with Stewart as the beneficiary, but no evidence of this fact was introduced at trial.

In January 1998, Stewart hired respondents Ward and Sonya Haynes,[1] who operated a handyman business, to perform minor repairs on the Johnson house. During the course of the work, Stewart discussed her financial situation with Haynes, explaining that she was in bankruptcy and that the house she occupied was in foreclosure. Stewart asked Haynes whether he knew anyone who would like to purchase the house. According to respondents, Stewart represented to them that she held title to the house.

After looking at the house, respondents agreed to buy it, and the parties went to a paralegal, Fay Swanson, who drew up a contract for the sale of the house to respondents, and prepared two deeds in that connection. The parties signed the contract on February 6, 1998, and respondents moved into the house about two weeks later. They were still living there at the time this case was tried in February 2002.

On July 14, 1998, Stewart filed a complaint in Alameda County Superior Court against respondents, Swanson, and the notary whose seal appeared on the deeds executed in connection with the transfer of the house to respondents. The complaint alleged causes of action for breach of contract; fraud; declaratory relief; infliction of emotional distress; false certification by the notary; and unauthorized practice of law by Swanson and the notary. In addition to damages, the complaint sought the issuance of an injunction prohibiting respondents from harassing Stewart and her family, and a decree quieting title to the house in the estate of Charlean Johnson. The complaint did not allege a violation of, or cite, the Civil Code sections regulating the conduct and liability of foreclosure consultants (the mortgage foreclosure consultants law). (Civ. Code, §§ 2945-2945.11.)

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[1] We will refer to Ward Haynes as Haynes, and Ward and Sonya Haynes collectively as respondents.

On December 4, 1998, a default judgment was entered against all of the defendants. On December 8, 1999, however, respondents succeeded in obtaining an order setting aside the default judgment as to them.[2]

Respondents then filed an answer, as well as a cross-complaint against Stewart alleging that she had fraudulently represented to them that she had title to the house when she sold it to them. The case was tried without a jury on February 20 and 21, 2002.

On the second day of the trial, after Stewart had rested her case, and after respondents had made a motion for judgment under Code of Civil Procedure section 631.8, Stewart's counsel sought leave to amend the complaint to allege a violation of the mortgage foreclosure consultants law. Respondents' counsel objected on the basis of surprise, noting that the proposed amendment would constitute a change in the theory of Stewart's case. The judge reserved ruling on the motion in order to permit counsel to brief the issue during the noon recess, and then denied the motion orally on the record later the same day.

At the conclusion of the trial, the trial court ruled in favor of respondents on all of the causes of action alleged against them in Stewart's complaint, and respondents then dismissed their cross-complaint. Judgment was entered on April 5, 2002, and Stewart filed a notice of appeal on June 3, 2002.

DISCUSSION

A. Appealability of Order Setting Aside Default Judgment

Stewart's main arguments on appeal consist of challenges to the trial court's order setting aside the default judgment against respondents, which was filed on December 8, 1999 (the December 1999 order). Under Code of Civil Procedure section 906,[3] however, we have no authority "to review any decision or order from which an appeal might have

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[2] The other defendants (Swanson and the notary) were still in default at the time of trial, and are not parties to this appeal. As far as the record before us reveals, the default judgment is still in effect as against them personally.

[3] All further unspecified references to statutes are to the Code of Civil Procedure.

been taken." (See *Hobbs v. Bateman Eichler, Hill Richards, Inc.* (1985) 164 Cal.App.3d 174, 190-191 [where defendants failed to appeal from appealable orders denying motion to compel arbitration, asserted errors in such orders could not be reviewed on subsequent appeal from ultimate judgment]; Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2002) ¶ 2:13, p. 2-10 ["If a judgment or order is *appealable*, aggrieved parties *must* file a *timely* appeal or forever *lose* the opportunity to obtain appellate court review . . . . This . . . is a *jurisdictional* principle . . . ." (Italics in original.)] Thus, as respondents point out, if the December 1999 order was appealable, Stewart's failure to file a timely notice of appeal from it precludes us from considering her current arguments challenging its correctness.

The statute governing appealability, section 904.1, provides in relevant part that "An appeal . . . may be taken from any of the following: [¶] (1) From a judgment [with certain exceptions, not including default judgments] . . . . [¶] (2) From an order made after a judgment made appealable by paragraph (1)." (§ 904.1, subd. (a).) Thus, under subdivision (a)(2), an order made after an appealable judgment is itself appealable.

Because a default judgment is an appealable judgment, an order setting aside such a judgment traditionally has been held to be appealable as well. (See, e.g., *Phelan v. Superior Court* (1950) 35 Cal.2d 363, 370; *Yarbrough v. Yarbrough* (1956) 144 Cal.App.2d 610, 613; *Baske v. Burke* (1981) 125 Cal.App.3d 38, 43; *Elsea v. Saberi* (1992) 4 Cal.App.4th 625, 628; see generally 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 148. pp. 214-215; Eisenberg, *supra*, Cal. Practice Guide: Civil Appeals and Writs, ¶¶ 2:165, 2:166, pp. 2-87 to 2-88.) Stewart argues that these cases are no longer

good law, relying primarily on *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644 (*Lakin*).[4]

In *Lakin*, the Supreme Court noted that "[d]espite the inclusive language of . . . section 904.1, subdivision (b) [now codified as subdivision (a)(2)], not every postjudgment order that follows a final appealable judgment is appealable. To be appealable, a postjudgment order must satisfy two additional requirements." (6 Cal.4th at p. 651, fn. omitted.) Those requirements are (1) "that the issues raised by the appeal from the order must be different from those arising from an appeal from the judgment," and (2) "that 'the order must either affect the judgment or relate to it by enforcing it or staying its execution.' [Citation.]" (*Id.* at pp. 651-652.) An order setting aside a default judgment plainly meets both of those criteria, and Stewart does not seriously argue otherwise.

What Stewart does argue is that *Lakin* imposed a third requirement, namely, that the order must not be "preliminary to future proceedings and will not become subject to appeal after a future judgment." (*Lakin*, *supra*, 6 Cal.4th at p. 654.) This argument misreads *Lakin*, and takes the quoted language out of context. In *Lakin*, the Supreme Court held that a postjudgment order denying attorney fees *was* appealable. In so doing, the court rejected the argument that a postjudgment order does not "affect" the judgment, and therefore is not appealable, if it neither adds to or subtracts from the judgment in a

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[4] The plain language of subdivision (a)(2) suffices to refute appellant's additional argument that when section 904.1 replaced former section 963 in 1968, the provision in former section 963 permitting appeals of "any *special* order made after judgment" (italics added) was repealed. In fact, that provision was reenacted in substance as what is now subdivision (a)(2). Appellant does not argue, and we have found no authority holding, that the legislative intent underlying the deletion of the modifier "special" was to narrow the ambit of the former statute in any way. On the contrary, the two provisions were treated as substantively identical in *Page v. Insurance Co. of North America* (1969) 3 Cal.App.3d 121, 127, which held that a trial court order granting coram nobis and vacating a final judgment was appealable under either version.

literal sense. (See *id.* at p. 653.[5]) It was in that context that the court held that a post-judgment order denying attorney fees *was* appealable, even though it did *not* directly affect the judgment, because it was "not preliminary to future proceedings and will not become subject to appeal after a future judgment." (*Id.* at p. 654.) In using this language, however, the court did not *add* a separate requirement for the appealability of post-judgment orders. Rather, it simply interpreted the meaning of the requirement that the order "affect the judgment" in a *broader* sense, to allow appeals from post-judgment orders that finally determine the rights of the parties as to an issue not addressed in the judgment itself. (See generally *City and County of San Francisco v. Shers* (1995) 38 Cal.App.4th 1831, 1837-1840 [holding that under *Lakin*, post-judgment order appointing successor receiver is appealable as to qualifications of successor receiver].)

There can be no question that an order setting aside a default judgment directly "affects" that judgment. Accordingly, we find nothing in *Lakin* that impliedly overruled the earlier cases, cited *ante*, uniformly holding that an order setting aside a default judgment is immediately appealable. Moreover, contrary to Stewart's representation in her reply brief, there is at least one case decided after *Lakin* (and, a fortiori, after the enactment of section 904.1) holding that an order setting aside a default judgment is appealable as an order after judgment. (See *County of Stanislaus v. Johnson* (1996) 43 Cal.App.4th 832, 834 [not discussing *Lakin*]; see also *Garcia v. Hejmadi* (1997) 58

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[5] "For some time, courts – including this one – have used the 'neither adds nor subtracts' standard here employed by the Court of Appeal as a yardstick to measure whether a postjudgment order affects the preceding judgment or relates to its enforcement. [Citation.] This standard, however, has never been an exclusive statement of the necessary relationship between a judgment and an appealable postjudgment order. Although the standard can be useful in some circumstances, the effect on, or relationship to, the judgment required to make a postjudgment order appealable is not limited to a simple mathematical calculation. To conclude otherwise would mean that a postjudgment order awarding attorney fees – thereby adding to the judgment – was appealable, while a postjudgment order denying attorney fees – neither adding to nor subtracting from the judgment – was not. This is not the law." (*Lakin*, *supra*, at p. 653, italics omitted.)

Cal.App.4th 674, 680 [holding that order vacating summary judgment was appealable on subsequent appeal from judgment after trial, because summary judgment order itself was not appealable; reasoning that "[a]n order granting a motion to vacate under section 473 is itself appealable, and thus reviewable only by direct appeal, where the order it vacates was an appealable final judgment."].)

In short, we agree with respondents that by failing to file a timely appeal from the December 1999 order, Stewart lost the right to seek appellate review of that order. Accordingly, we lack jurisdiction to consider the merits of Stewart's arguments that it was entered in error.

B. Denial of Motion to Amend Complaint

The only issue raised by Stewart's briefs on appeal that is properly before us is her contention that the trial court erred in denying her request for leave to amend her complaint to include allegations based on the mortgage foreclosure consultants law. (Civ. Code, §§ 2945-2945.11.) We review this ruling for abuse of discretion. (*Levy v. Skywalker Sound* (2003) 108 Cal.App.4th 753, 770; *Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290, 296-297.)

Stewart argues that the trial judge erred in concluding that respondents were not foreclosure consultants within the meaning of the mortgage foreclosure consultants law. We do not reach the merits of this contention, because even if it were true, Stewart has not convinced us that the trial court abused its discretion in denying her request for leave to amend.

As already noted, Stewart did not seek leave to amend her complaint until the second day of the trial, after she had already rested her case, and after respondents had made a motion for judgment under Code of Civil Procedure section 631.8. Neither before the trial court, nor in her briefs on this appeal, has Stewart made any attempt to explain why she failed to raise the issue earlier. Moreover, the amendment Stewart sought leave to make did not merely seek to conform the existing allegations of the complaint to the proof adduced at trial. Rather, what Stewart requested was leave to amend the complaint to allege an entirely new cause of action, i.e., one alleging violation

of the mortgage foreclosure consultants law. Under these circumstances, the trial court cannot be said to have abused its discretion in declining to allow the amendment. (See *Levy v. Skywalker Sound*, *supra*, 108 Cal.App.4th at pp. 770-771; *Record v. Reason* (1999) 73 Cal.App.4th 472, 486-487.)

DISPOSITION

The judgment is affirmed.

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Ruvolo, J.

We concur:

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Haerle, Acting P.J.

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Lambden, J.